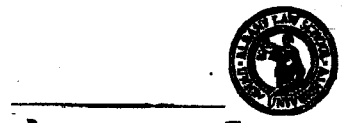


# ALBANY LAW SCHOOL

**Michael J. Hutter**
**PROFESSOR OF LAW**

October 19, 2000

Kevin A. Malone, Esq.
Krupnick, Campbell, Malone, Roselli, Buser, Slama,
Hancock, McNelis, Liberman & McKee, P.A.
700 SE Third Avenue, Suite 100
Fort Lauderdale, Florida 33316

***Via Facsimile & Regular Mail***

**RE: DEPARTMENT OF AMAZONAS, et al vs. PHILIP MORRIS COMPANIES, INC., et al**
**00 CV 2881 (NGC) (consolidated)**

Dear Mr. Malone:

You have asked me to review a contingent fee contract between the Department of Boyaca of the Republic of Columbia and a New Orleans, Louisiana law firm, Sacks and Smith, L.L.C., and a Fort Lauderdale, Florida law firm, Krupnick, Campbell, Malone, Roselli, Buser, Slama, Hancock, McNelis, Liberman & McKee, P.A., pursuant to which the Department has retained the law firms to bring an action on its behalf against certain multi-national tobacco companies. You have further informed me that such an action has been commenced in the Eastern District of New York. Your requested review arises from an allegation made by one of the attorneys for the tobacco companies that said contract violates certain New York ethical guidelines.

Specifically, two provisions in the contract are challenged. One provision, contained in paragraph 2, provides that costs incurred by the law firms during the prosecution of the action will not be payable by the Department if there is no recovery. The other provision, contained in paragraph 12, provides that the law firms will pay any court-ordered attorneys' fees and/or expenses of the tobacco companies, and will defend and indemnify the Department against any claims asserted against it by the tobacco companies.

I have reviewed the contract, and the October 12, 2000 letter from attorney Irvin B. Nathan wherein the allegation is made. I have also reviewed the governing law. In my opinion, there is no need to determine whether the challenged contractual provisions in fact violate any New York ethical

guidelines, as the validity and enforceability of these provisions are to be determined under the pertinent laws of the State of Louisiana.

My opinion is predicated upon paragraph 14 of the contract which provides:

> "**Governing law**: This contract shall be governed by and interpreted in accordance with the laws of the State of Louisiana, U.S.A., and any action to enforce or interpret this contract shall be brought in the courts of the State of Louisiana."

As discussed, *infra*, under applicable state choice of law principles, this selection by the parties of Louisiana law to govern their contract and the validity of its provisions will be respected by the New York courts, federal or state.

Initially, it must be noted that in determining the validity of the contract a federal court, here the district court for the Eastern District of New York, will apply the choice of law rules of New York. (See, *Valley Juice Ltd., Inc. vs. Evian Waters of France, Inc.*, 87 F.3d 604, 607 [2nd Cir. 1996]). Although the contract here is one involving attorneys, the traditional New York choice of law rules still govern this contract. (See, Restatement of the Law Governing Lawyers, §1, Comment[e]; Restatement of Law (2d) of Conflict of Laws, Section 196, Comment[a]; see also, *Bernick vs. Frost*, 510 A2d 56 [NJ Superior Ct. App. Div. 1986]).

Under New York choice of law rules, it is beyond cavil that the courts will enforce the parties' contracted choice of law provision, provided that the law of the state selected has a "reasonable relationship" to the contract, and the pertinent law of that state does not violate a fundamental public policy of New York. (See, *Finucane vs. Interior Construction Corp.*, 264 AD2d 618, 695 NYS2d 322 [1st Dep't. 1999]; *International Minerals and Resources, S.A. vs. Pappas*, 96 F3d 586, 592 [2nd Cir. 1996]). Here, it is clear that these two conditions are met.

As to the "reasonable relationship" requirement, the selection of the laws of Louisiana, a civil law jurisdiction, satisfies such requirement as one of the law firms representing the Department, Sachs and Smith, is located in Louisiana. The state domicile of a law firm representing a party whose law is chosen is sufficient to satisfy this requirement. Indeed, the extant law fully suggests otherwise. (See, *Bernick, supra*; Restatement of Law (Second) of Conflict of Laws, §187, Comment[f] [test met "where one of the parties is domiciled" in the selected state]; see also, *Valley Juice Ltd., Inc.*, 87 F.3d at 608, *supra*). Moreover, the choice here of Louisiana law and its civil law precepts here is especially appropriate for the Department.

Regarding the second requirement, I understand, the two challenged provisions do not violate any ethical standards in Louisiana law. However, it is alleged that they violate New York statutes prohibiting champerty and maintenance and New York ethical guidelines.

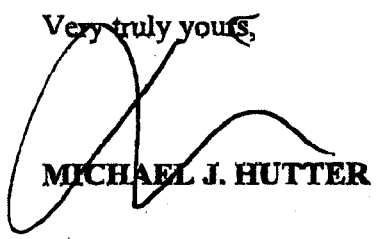
It must be borne in mind that a foreign law is not offensive to New York public policy merely because it differs from New York law. (*Loucks vs. Standard Oil Co.*, 224 NY 99, 111 [1918]). Rather, it must be demonstrated that the chosen foreign law would "'violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.'" (*Cooney vs. Osgood Mach., Inc.*, 81 NY2d 66, 78, 595 NYS2d 919, 926 [1993]), quoting *Loucks*, 224 NY at 111, *supra*).

Even assuming that the challenged provisions are inconsistent with Judiciary Law §§488(2), 498, (a proposition which, I would note, is highly doubtful (*Elliott Assoc., L.P. vs. Banco De La Nacion*, 194 F3d 363 [2d Cir. 1999]), these statutes with their limited scope do not appear to reflect any "deep rooted" policy which would be violated by the challenged contractual provisions. (See, *Bluebird Partners, L.P. vs. First Fidelity Bank, N.A.*, 94 NY2d 726, 709 NYS2d 865 [2000]; Martin, Financing Plaintiffs' Lawsuits: An Increasingly Popular (and Legal) Business, 33 U. Mich. J.L. Ref. 57, 61-65 [1999]). Indeed, there has been no showing by the tobacco companies' attorney which would meet their heavy burden of establishing such a violation of a fundamental public policy of New York.

While the challenged provisions may well be in conflict with DR5-103(a) and DR 5-103(b)(1), the fact that Louisiana counsel and Florida counsel may ultimately have to absorb costs and the tobacco companies' attorneys' fees, if unsuccessful, and damages as well, would not appear to run afoul of any deep-rooted New York public policy. Such conclusion is especially appropriate here where there appears to be no real chance that the risks the ethical guidelines seek to prevent from occurring will in fact happen. (See, *County of Suffolk vs. Long Island Lighting Co.*, 710 F.Supp. 1407, 1413-1415 [ED NY 1989]).

In sum, it is my opinion that the validity of the two challenged provisions in the contingent fee contract is not to be determined by the application of New York ethical rules. Rather, their validity is governed by the parties' contractual choice of law, Louisiana.

Very truly yours,



**MICHAEL J. HUTTER**

MJH:kd